

# The Nature and Legal Standing of the Islamic Sentence in the Islamic Legal System

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## Abstract

The source of the Islamic law originally comes from Al-Qur'an (revealed by Allah) and Hadith (stated by the Prophet Muhammad Sallallahu Alaihi wa Sallam). If there are problems that are not described explicitly in these two sources, then Ijtihad will do in order to find a legal solution. The punishment is part of the shari'ah law in upholding truth and justice prevailing since the coming of the Prophet Muhammad. Therefore, at the time of the Prophet and the Caliphs, the Islamic criminal law applies as positive law in which the law that regulated and implemented by the government (ulil amri) as the legitimate authority... The objective of punishment is to retaliate for evil; to prevent in general and in particular; and to protect the rights of the victim, as well as the heirs of the victim. Punishment in Islamic criminal system is *qiyas*, *diyat*, *kafaraat*, disenfranchisement inherit, and *ta'zir*. In terms of the legal position of the the Islamic sentence law, the Islamic law has outlined 3 (three) types of law, as followings: *I'tiqadiyah* Law, *Khuluqiyah* Law, and *Amaliyah* Law.

**Keywords:** Nature and Legal Standing; Islamic Sentence; Islamic Legal System.

## 1. Introduction

The Islamic legal system (Islamic law) is a universal law. It is because its entry into force is not limited by the territory of one country and it is irrespective of ethnic background or race differences. The source of the Islamic law originally comes from Al-Qur'an (revealed by Allah) and Hadith (stated by the Prophet Muhammad Sallallahu Alaihi wa Sallam). The substance of the Islamic legal system then regulates all aspects of human life, both the life of nowadays and the life hereafter..

The Islamic legal system refers to a view of the law theologically and is also culmination of all laws revealed to the previous religions such as Hebrew, Yahudi, and Christianity. The existence of the Islamic legal system essentially is to create world peace and happiness in the context life after. The legal aspects of regulation including procedural law is the law regulating dispute settlement procedures in social life for the sake of creating harmonious life in the world.

The Islamic legal system of Islamic (Sharia law) is guidance system of earthly life to respond all demands of the dynamic development of society. Both the Qur'an and hadith have set the basic rules and theories in which they are general laws public. They are therefore flexible in responding to all the demands of human beings needs.. Implementation of Shari'a in the governance system of the human race will always embody the livelihood fair, peaceful, and happy. So, if there are problems that are not described explicitly in these two sources, then Ijtihad<sup>1</sup> will do in order to find a legal solution.

Ijtihad as one of the source of the Islamic law can be the basis for formulating a positive Islamic legal system in force in Indonesia. The Islamic legal system in Indonesia basically has been enacted since before the independence of Indonesia that was proclaimed on August 17, 1945. It can be seen practically that the Islamic legal system has become the positive law in the Islamic kingdoms all around Indonesia's territory and its existence also has been recognized by the Dutch authorities. After the Indonesia's independence then, the existence of the Islamic legal system as part of a national law has been legitimated ideologically and constitutionally as stated in the first principle of Pancasila and Article 29 paragraph (1) and (2) of the Constitution of the Republic of Indonesia Year 1945.

Those thesis as mentioned above will be treated differentially in the context of the Islamic criminal law (public law). This takes place because there is still a negative view in part of the community regarding its application, particularly with respect to criminal sanctions such as flogging, cutting hands, and death penalty (stoning). Those

<sup>1</sup> Ijtihad means independent reasoning of the utmost effort an individual can put forth in an activity. It is recognized as the decision-making process in Shariah (Islamic) law through personal effort which is completely independent of any school of jurisprudence (fiqh).

sanctions are seen very cruel and inhumane. They are considered as a violation of human rights. On the other hand, the polemic concerning the substance of the Islamic criminal law is stated by David de Santillana. He says that the Islamic legal system is identical with the law of retaliation.<sup>1</sup> It is because the Islamic criminal law is based on *the eye for eye, tooth for tooth, ear for ear* which means that life must be paid with their lives. This conception is equal to primitive conception of revenge. A reformer named Abdullah an-Na'imi<sup>2</sup> denies the sanctity of law. According to him, the Shari'a is not be *illahiyyah* (from Allah – the almighty God). He states further that the Islamic legal law is primitive and antagonists.

A negative view of the Islamic criminal law as stipulated above was resulted from misunderstanding to the whole concept of the Islamic criminal law set forth in the Qur'an and hadith. The Islamic criminal law based on the structure of the Islamic legal system is part of public law, which is its law enforcement needs role of government (*ulil amri*) and awareness of Islamic people (*muslim*) themselves. Both role of government (*ulil amri*) and awareness of Islamic people are needed in order to respond to the new development and to encourage the process of moral development which is run by the state.

Therefore, the focus of this article focuses on the nature and the legal standing of the sentence in the Islamic criminal system.

## 2. The Nature of Sentence in the Islamic Punishment System

Punishment in an Islamic criminal perspective does not depart from human opinion or mere human convention. It is because human beings point of view has limitation. The human being's view of something that is good, in fact is not necessarily good, and what is the bad human being's view, the fact is not necessarily bad. Therefore for Muslims, good and bad things must restore in the eyes of shari'ah.

The punishment is part of the shari'ah law in upholding truth and justice prevailing since the coming of the Prophet Muhammad. Therefore, at the time of the Prophet and the Caliphs, the Islamic criminal law applies as positive law in which the law that regulated and implemented by the government (*ulil amri*) as the legitimate authority. At that time, it is occupied by the Prophet himself and then be replaced by a Caliph.

According to Ahmad Wardi Muslich<sup>3</sup>, sentence in Arabic is called 'uqubah'. The word 'Uqubah' comes from the word 'Aqabah' that is synonym to 'khalafahu wa jaa biaqabihi'. Its meaning is "together with and come behind". Its pronunciation (*lafadz*) seems to "jazaahu sawaa an bima faala" that has been meant as "reward according to what his/her done". According to Ahmad Warson Munawwir in the Munawwir's dictionary, sentence in context of the Islamic punishment is known as the word 'uqubah'<sup>4</sup> which means "torture or punishment". Torture in this term means "the punishment for acts that violate the provisions shari'ah established for the benefit of society". Meanwhile, according to Neufeldt<sup>5</sup> punishment means "a penalty imposed on an offender for a crime or wrong doing".

'Uqubah' or punishment can also be termed to the word 'al-iqab' as contained in QS. Ali Imran (3) paragraph 11: "... and Allah is severe in His punishment".

Similarly, in QS. Al-Anfal (8) paragraph 13:

"... So verily Allah is severe in His punishment".

The word 'al-iqab' preceded by the word "syadiid, which means "the most, so and so". This word shows the meaning of evil and doom that is really sad. The word 'al-iqab' as mentioned in both the verses shows replying sin as a result of man's evil deeds.

Based on the understanding of the Arabic language as stipulated above, it can be understood that the sentence (punishment / uqubah) are all forms of torment, sanctions or the like that is imposed on a person as a result of his actions which violate such rule or regulation either set by God in the words of his or regulation, norms, or legislation agreed on the community. All form of torture or sanctions imposed on a person essentially in the

<sup>1</sup> David de Santilana, *Law and Society*, in Anwar Harjono, *The Islamic Legal System: Its Broadness and Justice*, Bulan Bintang, Jakarta, 1968, p. 151.

<sup>2</sup> Abdullah Ahmed an-Naim, *Deconstruction of Shariahi*, translated by Ahmed Suaedy and Amiruddin Arrani, LKIS, Yogyakarta, 1997, p. xi.

<sup>3</sup> Ahmad Wardi Muslich, *an Introduction and Principle of the Islamic Criminal Law (Fiqh Jinayah)*, Sinar Grafika, Jakarta, 2004, p.136.

<sup>4</sup> Ahmawa Warson Munawwir, *Al-Munawwir: Dictionary Arabic-Indonesia*, Pustaka Progressif, Surabaya, 1997, p. 952.

<sup>5</sup> Neufeldt Victoria, *Webster's New Word Dictionary*, Macmillan Company, New York, 1996, <http://andreferari.wordpress.com>, accessed February, 10th, 2014.

Islamic punishment should have a legal basis. The punishment would be then an individual in terms of the penalties but in terms of application is universal and general.

The punishment is considered to have a basic (Shari'ah) if it is based on the sources of the Islamic law such as Al-Quran, As-Sunnah of the Prophet, *ijma'* ulama (jurists or scholars), or regulations set by the competent institutions (*ulil amri*) as if the sentencing of *ta'zir*. In terms of *ta'zir* set by *ulil amri* then, it is required that it must not conflict with the provisions of the Islamic laws'. If there is conflict of law amongst them, the provisions of the sentence is void. The punishment can be applied if there is a strong legal basis substantially as commanded by Allah in some verses, such as QS.Al-Isra '(17) : 15 "... And we will not torture before we sent an Apostle".<sup>1</sup> Similarly in verse. Al-Baqarah (2): 286 "Allah does not burden a person except according to his ability ...".<sup>2</sup>

The punishment should be personal (individual). It means that it is given to the person who commits an offense, and is not allowed on other people who are innocent. This requirement is one of the basic and principles upheld in sentencing in the Islamic law. In terms of the punishment should be universal and apply commonly, the punishment should essentially apply to everyone without any discrimination either rank, position, status, or position. In the Islamic punishment, the perfect equation solely is in the form of a criminal offense and the punishment such as *had* and *qisas-diyat*. Both *had* and *qisas-diyat* has been determined by shari'ah.

Any person who commits an offense of *hudud* will be punished by punishment consistent with their offense does. While the equation is required of punishment *ta'zir*, it must be equal to this aspect of the impact of the punishment of the perpetrators - namely prevention, education, and improvement. Most offenders may simply punishment of warning, some of them need to be imprisoned, and others may have suffered or even others should be subjected to the death penalty.

The purpose of the punishment in the system is the realization of the objectives of the Islamic legal system (Shari'ah) itself. The objective of it is to retaliate for evil; to prevent in general and in particular; and to protect the rights of the victim, as well as the heirs of the victim. Prohibition and order are not enough to prevent people from doing something that is forbidden or ordered to leave it. According to Abdul Qadir Audah,<sup>3</sup> the punishment could create a sense of security and control over human beings, as well as to overcome and counteract the bad nature of human beings, and to ensure continuity of community strongly and nobly, as the word Allah in QS al-Baqarah (2); 179:

"And in (the law) qisas is there (saving of) Life to you, O men of understanding, that ye may ward off".

The applied punishment is fulfilled after some elements/requirements both general and specific nature are reached. A general element is the elements that must be met at each crime (*jarimah*), generally consists of 3 (three) elements namely:

1. ar-Rukn ash-sharī (formal elements);
2. ar-Rukn al-Maddi (material elements); and
3. ar-Rukn adabi (moral element).<sup>4</sup>

In terms of elements of a specific nature, it may differ in the number and types according to different criminal acts. This provision for the punishment imposed in the system of law as an act *ihkhtiyath*. It is "a precautionary acts to provide stability in the hearts of problem resolution in a moral burden". Even a judge in action of *ihkhtiyath* is to decide a case that must uphold in 2 (two) principles, namely:<sup>5</sup>

1. Avoiding punishment *had* in the case that contains *subhat* elements;
2. Forgiving by a judge is better than to sentence.

The Shari'ah system has required the punishment due to it can bring essential benefit for the community as well as maintain the benefit. System implementation of criminal punishment in the law system is based on the theories of punishment contained in Al-Quran. The criminal offenses and its punishment may be based on:

1. Compliance and faith in Allah and His Messenger;

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<sup>1</sup> Ibid, p. 284

<sup>2</sup> Ibid.p.50.

<sup>3</sup> Abdul Qadir Audah, *At-Tasyri' al-Jina'i al-Islamiy Muqaranan bil Qanunil Wad'iy*, translated by Tsalisah Team, *Encyclopedia of the Islamic Criminal Law, ed.1*, Kharisma Ilmu, Jakarta, 2008, pp. 89-90.

<sup>4</sup> Ibid.p. 129.

<sup>5</sup> Makhruh Munajat, *Deconstruction of the Islamic Criminal Law*, Logong Pustaka, Yogyakarta, 2004, p. 40.

2. The decision is based on human common sense to get the benefit of the world and happiness in the hereafter. The punishment is given to eradicate sins of the world and punished before Allah in the hereafter. It is appropriate to Hadith of the Prophet that "the punishment of the world (*hudud*) is away sins in the afterlife".<sup>1</sup>

The balance of punishment is required, but more particularly the the context of punishment is *qisas* punishment to apply forgiveness and patience. To apply *qisas*, the action must be calculated rationally. It means that all criminal requirements must be charged in order to the perpetrators can be held their criminal liability. According to Mohammed S. El-Awa, there are 2 (two) basic aspects of the formulation of the sentence in a criminal offense, namely:

1. Retribution of punishment; and
2. Deterrence of punishment.<sup>2</sup>

The function of punishment's retribution is influenced by the presence of Quranic verses that discuss many aspects of this levy. Example reply as Allah says QS. al-Maidah (5); 38:

"The man who steals and the woman who steals, cut off their hands (as) in retaliation for what they do and the torment of Allah ....".

According to M. Qurais Shihab<sup>3</sup> in his commentary, "al-Shariq gives the impression the person who has been repeatedly stealing". The word *Jaza* '(rewarded) in the verse is used for both meanings 'punishment and reward'. Philosophically, the punishment and reward equally used for different purposes, namely the provision of retribution for good deeds or damages for violations of the law that has been done by someone. According to Abdullah Ahmed An-Na'im<sup>4</sup> and Mohammed S. El-Awa,<sup>5</sup> in terms of "retribution" is as the rational reasons (legal reasoning) behind sentencing. There are 2 (two) things that are inherently indispensable, namely:

- a. The harshness of a punishment;
- b. The punishment must be given to the perpetrators of crimes.

When compared to a form of punishment in another criminal justice system, then this form of punishment is disbelief in the Islamic criminal law as a means of loudest punishment. According to Muhammad Qutb<sup>6</sup>, the severity of punishment in the Islamic criminal law is based on the consideration of psychology. It means that in terms of combating the tendency for a criminal to break the law", then the system of Shari'ah should give harsh sentences that are reciprocal replying to the crimes committed. The purpose of it is to be a deterrent and not repeating his actions. The hardest of criminal punishment in Islam is more affected by the phenomenon of dominant forms of corporal punishment in it. All forms of punishment for criminal acts contained in the Qur'an, such as cutting hands off, whipping, and stoning.

The punishment will lose its retributive if it is inflicted on people who commit crimes. It means that it is universal in nature due to the criminal justice system is also recognized by the western countries. In the UK, it is not only the public that wants its retributive punishment but also this doctrine itself has pretty strong roots in British jurisprudence and legal philosophy. According to Arthur Lehman Goodhart,<sup>7</sup> "retribution in one punishment is essentially an expression of disapproval of society against criminal acts, and if it si not taken into consideration, then it means that society's disapproval may be lost". While the aspect of deterrence of the punishment, the ultimate goal of deterrence is to prevent such criminal acts to be done in the future. This is the reason rationally why the punishment should be imposed. If the retribution is more likely to return for the criminal act, then the deterrence has projection to prevent the violation to be happened again.

The effect of deterrence has 2 (two) objectives, namely internal and general purposes. The internal aspect of the deterrence is addressed to the perpetrators of these crimes not to repeat the action, while a general deterrent is to be projected to the community in order for them to be afraid to commit criminal acts. The nature of deterrence is to grow fear of punishment as a form of justification which are effective in the process of sentencing.

The deterrent aspect of the Islamic criminal law is the most powerful system of adoption compared with other criminal system. The Shari'ah system views that the nature of deterrence is the most important thing in

<sup>1</sup> Syahiddin et.al, *The Contemporer of Islamic Education*, Yayasan Masyarakat Indonesia Baru, Jakarta, 2004, p. 79.

<sup>2</sup> Mohammed S. El-Awa, *Punishment in Islamic Law*, American trust Publication, Indianapolis, 1982, pp.23-35.

<sup>3</sup> M. Quraish Shihab, *Al-Misbah's Translation*, ed.ix, Vol.3, Lentera Hati, Jakarta, 2007, p.91.

<sup>4</sup> Abdullah Ahmed An-naim, *Toward in Islamic Reformation*, Syracuse University Press, New York, 1990, p. 112.

<sup>5</sup> Mohammed S. El-Awa, op.cit, p.25.

<sup>6</sup> Muhammad Qutb, *Manhaj al-Tarbiyyah al-Islamiyyah*, Beirut, 1967, pp.231-234.

<sup>7</sup> Arthur Lehman Goodhart, *English Law and the Moral Law*, Stevens, London, 1953, p.93.

sentencing. According to al-Mawardi, the aspect of deterrence is located on *hudud* criminal offense Al-Mawardi defines *hudud* as a criminal offense. He states that "Deterrent punishment created by God is to prevent man foul on what is forbidden by Him and ruled out what He commands."<sup>1</sup>

The nature of deterrence is a motivation to reveal the secret of Allah in the punishment *had*, including to some other punishment in sentencing Islam like punishment for adultery. Why must do in front of the community? The purpose of deterrence is aimed to create fear of making the same thing as affirmed by Allah in QS Al-Isra '(17); 32: "And do not approach adultery; (Adultery) is really a heinous act, and an evil way ". This verse means that man is forbidden to approach on fornication. Even approach is forbidden, the man does not do it due the punishment is very heavy.

Implementation of criminal punishment in Islam consider several principles, as followings:

- a. The punishment is only inflicted upon those who do *jarimah* or a crime. It is based on the word of Allah in the Qur'an. al-An'am (6); 164: "... Every sin of a person must be responsible by himself. And one will not bear the burden of the sins of others .... "

Accountability *jarimah* is only be borne by the person doing the act and should not be inflicted on anyone other than the perpetrators themselves.

- b. The deliberation.

A person convicted of a crime if there is a deliberate intention to commit a crime. If there is no deliberate, it means that there is negligence, mistake, or wrong or forgotten. Although by mistake or mistaken or forgotten, but it is not a punishment for a crime, but for the benefit and education. This is in accordance with God's word QS an-Nisa (4); 92: "And it is not fitting for a believer to kill a believer (the others), except for the error (accidentally) ...."

The principle of deliberateness in doing *jarimah* is distinguished by the act due to negligence, mistaken or forgotten. If *jarimah* done due to deliberate, then the perpetrator subject to penal sanctions for committing the crime. Things are different, if *jarimah* done due to negligence, mistakes or forgetfulness, the perpetrator will be subject to penal sanctions that are the benefit and educate.

- c. The punishment is only imposed if the crime conclusively been done.

The punishment is basically the result of a man's own making, the word Allah in QS. at-Taubat (9); 74: "... And if they turn away, Allah will punish them with a painful torment in this world and the hereafter, and they do not have a protective and not (also) a helper in the earth".

In this verse, Allah offers to man to repent even though the man has done that is so bad, and if people do not immediately repent then the punishment for what he did to be obtained either in the world or the hereafter. In this case, there is no human being who can help.

There are some punishment in Islamic criminal system, as followings:

1. Qisas (punishment);

The word *qisas* comes from the word *qashsha* that means "cut" or *aqtashsha* means "following". *Qisas* then is meant as "follows the actors to act the same reply from his actions".<sup>2</sup> Based on the word of *aqtashsha*, the punishment of *qisas* is to sentence the perpetrators like what he had done to the victim. For example, if the perpetrator killed, it means that he should be killed or if he wounded, he has to be injured also. In this sentence, the victim or his guardian is given the authority to forgive. If forgiveness, *qisas* fell off. Granting forgiveness (pardon) can be done with free or by paying *diyath* to the victim or his guardian, but the pardon does not preclude the right of the ruler (*ulil amri*) to sentence *ta'zir* in accordance with what has been done by the perpetrators.

Ordering to carry out the punishment of *qisas* is based on the word of Allah in QS. al-Baqarah (2); 178: "O ye who believe! Prescribed for you (carry out) *Qisas* pleased with the people who are killed. A free man with a free man, a slave to slaves, women with women. But those who obtain a pardon from his brother, let him do it well, and pay blood money (compensation) him well (also) .... "

Ordering itself in the Islamic legal system is to carry out the *qisas* in order to guarantee a safe life for people who want to kill. If he knows that he would be punished killed too, then people will stop doing the killing. It means that the person can also give life to others. Furthermore, the purpose of the verse to safeguard life, property, intellect, honor, religion and deterring perpetrators.

<sup>1</sup> Al-Maawardi, *Ahkam al-Sultaniyyah from Al-Kitab al-Arabi*, Beirut, p. 221.

<sup>2</sup> Haliman, *The Islamic Shari'ah Criminal Law Pursuant to Doctrine of Ahli Sunnah*, Bulan Bintang, Jakarta, p. 275.

In connection with this verse, according to the M. Quraish Shihab:<sup>1</sup>

"The treatment of *qisas* as mentioned of al-Qur'an which literally means "to follow". From the same root of *qisas*, the word *qisas* (story) because the person who tells that the story follows the events step by step in accordance with chronology of events. The word of *Qisas* in Al- Qur'an means to warn that what is done to the perpetrators in essence simply following and as a result of his treatment of the victim."

*Asbab al-nuzul* of verses as mentioned above according to the hadith of Ibn Abi Hatim from Said bin Jubair<sup>2</sup> that tribes of Huyayin of Arabs in the days of *jahiliyyah* were always fighting amongst them even when Islam came. They made war between them; mutually wounded; murdered to slaves and women; and competing amongst them in a number of collecting treasure. Those terrible condition were the reason why the verse came down by Allah.

Based on the Al-Qur'an, *qisas* is already known by other religion before Islam came as Allah has assigned to the followers of Prophet Moses in QS. al-Ma'idah (5); 45: "We have set for them in it (the law) that lives (repaid) with the life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds (even) equal for equal (the same reply). Anyone who releases (right retribution) it, then it (becomes) a sin for him ....".

According to M. Quraish Shihab further that:

"The Quran stipulates the establishment of *qisas* for manslaughter. However, the current set (corresponding sounds of the verse above), Allah does not require it, but handed over to the family of the killed to specify their choice of the killer, either demanded from the authorities to kill or forgive him with material rewards of family killer ."

Similarly, if someone commits a crime, then the perpetrator will be sentenced in accordance with his crime. The legal basis for setting the appropriate punishment is in line with the word of God in QS.al-An'am (6); 160: "... And whoever did a crime, he will be balanced by its crime. They are not harmed in the slightest (wronged)". The verse 160 of al-An'am is to convey the same with what Allah states in QS. asy-Shura (42); 40: "And the reply of a crime is a crime worth ...."

Similarly, the word of Allah in QS. an-Nahl (16); 126: "And if you give a reply, then please respond with (children) are equal to torment that is worth to you, but if you are patient, it is verily better for the patient". Based on those Quranic verses, the criminal acts committed by a person who has *mumayiz* were sentenced to a certain punishment in accordance to justice as instructed by Allah.

## 2. *Diyat*;

*Diyat* is one of sentences that has been determined and set by Allah and His Messenger as a compensation for crimes against life. It means that the compensation is a kind of property within a certain size, which is given by the perpetrator to the victim or his heirs. Although it is punitive, *diyat* is a compensation to be given to the victim and not to the treasury countries.

*Diyat* basically is the material's right for the sake of the victim or his guardian. *Diyat* in this concept is more like compensation. The amount of *diyat* may vary according to differences in material losses occurred and according to different acts of deliberate or against crime. *Diyat* also can be said as a mix between punishment and compensation. It is said as punishment due to *diyat* established as a response to crime conducted by the perpetrator. If the victim gives forgiveness, the offender is released to pay *diyat*.

*Diyat* is the punishment that has certain restrictions. In terms of it, judges are not authorized to reduce or increase the amount of *diyat*. *Diyat* can be different for the crime conducted intentionally and unintentionally, as well as it is different in any criminal offense according to injured caused. Although, it is different as explained, but the size remains the same for every criminal act and every circumstance. In addition *diyat*, it is also *arsy*. Some scholars of *fiqh* distinguish between *diyat* and *arsy* although both are essentially the same, namely compensation. If *diyat* is a treasure that must be paid to human life while *arsy* is a treasure of compensation required for criminal acts against members of the body, which does not eliminate all the benefits such as losing a finger and others.

Based on the history of Islam, the punishment of *qisas-diyat* is not original as the tradition of the Qur'an. Long

<sup>1</sup> M. Quraish Shihab, *Tafsir Al-Misbah to the Verse QS al-Baqarah 178-180* in Metro TV Broadcasting, October 5th, 2006.

<sup>2</sup> Rohadi Abu Bakar, *Asbabun Nuzul: Causes of the Verses of Al-Quran Downgraded*, Wicaksana Berkahi Ilahi, Semarang, 1986, p. 33.

before the Quran was revealed, the punishment of *qisas-diyat* has become a tradition that was practiced by old-Arab society and developed into a practice that tends inhumane. The application of the law of *qisas* in the era tends to be the law of revenge. So, it does not change a law that legitimizes a culture of violence and oppression. Then, when the Islam came, The Prophet Muhammad continued the tradition of *qisas* punishment with certain adjustments are only applied to the crime of intentional killing, whereas the offenses of murder due to negligence are not subject to punishment *qisas*, as defined in QS. al-Maidah (5) verse 45, which applied the Prophet against Jews in criminal cases of wounding. The punishment of *Qisas* and *diyat* has been determined limit and does not have a lower limit or upper limit. However, the rights of individuals with the understanding that the victim can forgive the perpetrator and if so, the punishment will be removed/released.

### 3. Kafaraat

*Kafaraat* is basically a form of worship that is determined to atone due to perform immoral acts. If *kafaraat* is applied to acts which is not classified as immoral then *kafaraat* is pure worship. The shape and size of *kafaraat* is required for a criminal offense that is not the same, but varies according to the criminal offense committed by the perpetrator. *Kafaraat* is sometimes followed by *diyat*.

If a criminal offense committed is considered as an involuntary and mid-voluntary manslaughter, the principal of *kafaraat* is handled together with tight-*diyat* - called free a believing slave. If the offender does not get slaves or does not have enough money to pay the *kafaraat*, the punishment can be replaced by fasting for two consecutive months.

If the action of the perpetrator breaks the fast without any hindrance and *zihar*, it is required to provide dining to sixty needy. For violation of oath, it is required to provide food to ten needy and give clothes minimum of ten poor based on the Qur'an Surat al-Ma'idah (5) paragraph 89: "*aukiswatukum*". It means that gives them clothes".

### 4. Disenfranchisement inherit and do not accept the will

The disenfranchisement inherit and do not accept the will is an additional punishment for the perpetrators of criminal acts of murder, when the victim offender with no familial ties.

### 5. Ta'zir.

The Substance *ta'zir* aims to provide teaching, educating, and preventing others from committing similar. According to Abdurrahman Al-Jaziri,<sup>1</sup> "teaching or education is based on *ijtihad* of judges with a view to prevent forbidden acts not to be repeated. Any person who acts that are forbidden and not have *had*, *qisas* and *kafaraat*. For the judges are given the freedom to punish with a *ta'zir* based on *ijtihad* if it can prevent him not to repeat his actions.

*Ta'zir* is dropped by considering the severity of the crime, the circumstances of society, and the demands of the general interest. The role of *ta'zir* is still good either in specifically or in generally in the Islamic criminal system.<sup>2</sup> The role is surrendered by the government (*ulil amri*) or the court. In this case, the judges will take decision of it. The purpose of the determination is to manage the public in accordance with the times. In determining the punishment limit of *ta'zir* caused by doing evil or leaving an obligation that is not decided by shari'ah, its decision will be submitted to the authorities (*ulil amri*) at every time and place. It is because *ta'zir* wide open and each expert of *ijtihad* as well as judges can develop their own *ijtihad*.<sup>3</sup>

*Ta'zir* is applied not definitively, but it looks at the situation and conditions and how to act *jarimah* happened, when, who the victims, and what is appropriate sanctions imposed to ensure the peace and welfare of the people. According to Ahmad Hanafi,<sup>4</sup> in *jarimah ta'zir*, a judge must choose a sentence in accordance with the kinds of *jarimah ta'zir* and deeds of clusters punishment provided for *jarimah ta'zir* whether it has to be commuted or aggravated. The limit of *ta'zir* is determined by the reptile and good manners offender. If the offender has been repentance and good behavior then do not need the sentence passed. If the offender does not reptile and does nor well behaviour, the punishment must go on until the offender repent and behave well. *Ta'zir* can either relate to people or against individual perpetrators.

<sup>1</sup> Abdurrahman al Jaziri, *translated of Kitab Al Fiqh 'ala Mazahib al Arba'ah*, Dar al Kutub Ilmiah, Beirut, p. 397

<sup>2</sup> Ahmad Hanafi, *The Principle of Islamic Criminal Law*, Bulan Bintang, Jakarta, 1967, p.9

<sup>3</sup> T.M.Hasbi Ash Shiddieqi, *The Philosophy of Islamic Law*, PustakaRezki Putera, Semarang, 2001, p. 122.

<sup>4</sup> Ahmad hanafi, op.cit., p. 10.

### 3. The Legal Standing of the Islamic Sentence Law in Islamic Legal System

Qur'an as a primary source of the Islamic law has outlined 3 (three) types of law, as followings:

1. *I'tiqadiyah* Law. It governs the spiritual relationship between man and God; and all matters pertaining to the faith.
2. *Khuluqiyah* Law. It is affecting the behavior and moral of human beings both in religious life and society.
3. *Amaliyah* Law. It governs the physical relationship between human beings and its God; the relationship amongst human beings; and the relationship between human beings and its natural surroundings.<sup>1</sup>

The *I'tiqadiyah* law is then developed into *usuluddin* sciences and theology. It is the laws relating to the duties of a *mukallaf*. The *khuluqiyah* itself then is developed into moral science and the science of *tasawwuf*. The *khuluqiyah* is the law of laws relating to the behavior of a *mukallaf* to adorn himself with the properties of virtues, as qualities exemplified by the attitude of the Prophet Muhammad. The *amaliyah* law develops into shari'ah science which later evolved into several branches of science including the science of *fiqh*. The *amaliyah* law is the law governing all deeds, agreements, and *muamalah* amongs of human beings.

According to Muhammad Daud Ali<sup>2</sup>, the Islamic legal system both in terms of law and *fiqh* can be divided into:

1. Worship;
2. Muamalah.

Regarding the areas of worship, it is covering the procedure of how humans interreact directly to Allah, not to be added or decreased. The pattern of the relationship is fixed and it is impossible and should not be altered. The role has been governed by Allah directly and described in detail by His Messenger. It is because the field of worship is closed, so that in the matter of worship applies the general principle that "all acts of worship are prohibited except for acts explicitly told to do".<sup>3</sup> While on the field muamalah because of the open nature, it can be developed through *ijtihad* in which it applies the general principle that "basically all actions should be done, unless the act is no prohibition in the Qur'an and hadiths of the Prophet Muhammad".<sup>4</sup>

The division of the Islamic legal system in the field *muamalah* do not differentiate between civil law and public law. The parts of the Islamic legal system if they are developed based on a systematic method of law, according to Daud Muhammad Ali, then the Islamic legal system is divided into several parts:<sup>5</sup>

1. *Munakahat*;
2. *Wirasah*;
3. *Muamalat* in a certain sense;
4. *Jinayat or 'ukubat*;
5. *Al-Ahkam as-Sulthaniyah (Khilafah)*;
6. *Siyar, and*;
7. *Mukhasamat*.

More specifically, the section muamalat fields can be arranged in a broad sense, namely:

1. The Islamic Civil Law consists of:
  - a. *Munakahat* law. It is the law governing all things related to marriage, divorce and their consequences;
  - b. *Wirasah of fara'id* law. It is the law governing all things related to the deceased, the heirs, inheritance and the division of the inheritance;
  - c. *Mu'amalah* law (in a special meaning). It is the law governing all things related to material and rights over objects, order human relationships in terms of buying and selling, leasing, lending and borrowing, unions and others.
2. The Islamic Public Law (Islamic law in the field of public) consisting of:

<sup>1</sup> Rsyad Hassan Khalil, *Tarikh Tasyri al Islami Adawaru Tatawurihi, Mashadiruhu, Madzahibuhu Fiqhiyah*, Muqarrar Kuliyah Syari'ah Islamiyah, University of Al-Azhar, 2002.

<sup>2</sup> Muhammad Daud Ali, *The Islamic Law*, Rajagrafindo Persada, Jakarta, 2014.p.54.

<sup>3</sup> Ibid.p.55.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid, p. 56.



- a. *Jinayah* or *uqubat* law (fiqh scholars call with *jinayah fiqh*). It is the law containing rules regarding some laws on act which is punishable by either *jarimah* (criminal) *hudud* (predetermined crime that its shape and limit have been decided by in the Qur'an and Sunnah), *qisas-diyat* or *jarimah ta'zir* (a criminal act and a form of punishment limit is determined by the authorities (*ulil amri*) as a lesson for the perpetrators).
- b. *Al-Ahkam as-Sulthaniyah* (Caliphate). It is the law governing all things associated with heads of state, government, military, tax and matters relating to the relationship of the people and the state;
- c. *Siyar* law. It is the law describing how to manage the affairs of war and peace, religion and relations with other countries;
- d. *Mukhasamat* law. It is the law governing the issue of the judiciary, judicial, and procedural law in court.

According to M. Arfin Hamid<sup>1</sup>, *muamalat* law covers a number of areas of law. He states further that "*muamalat* in a broad sense includes civil law (family law, the law of objects), marriage law, inheritance law, *jinayat* (criminal law), *murafaat* (criminal law), *dusturiyah* (constitutional law), and *dauliyah* (international law)."

In connection with the criminal Islam, according to by Ramdan Al-Buti, there are 5 (five) criteria to determine public interest in the field *muamalah*, as followings:<sup>2</sup>

1. Prioritizing of the sharia'ah goals;
2. Not contradicting with the Quran;
3. Not contradicting with to the Sunnah;
4. No contradicting with to the principles of Qiyas; and
5. Considering the larger public interest.

The purpose of establishing shari'a that has orientation to 5 (five) topics - religion, life, intellectual, lineage, and property – is public interest. Everything that ignores these five things must create damage (*mafsadat*). Taking into the public interest and doing *ijtihad* in establishment of a law should not conflict with the texts of the Qur'an that *qat'i* (obviously its sources concepts), the Sunnah of the Prophet, and must not conflict with the principles of *qiyas* including to do *ijtihad* on clearly substance (content) in the issue of worship that is not allowed. However, *ijtihad* regarding the implementation of laws on the interests of man as the subject of the complex legal conditions is needed to be studied more in depth.

In determining the law, it must take precedence over the larger interests with the interests of others. According Ramdan Al-Buti, to rank the importance of the interest can be considered pursuant to the value of the interest, as follows:

- a. Looking at the value of the public interest in terms of his substance;
- b. Looking at the value of the public interest in terms of its scope; and
- c. Looking at the value of the public interest in terms of the consequences.<sup>3</sup>

According to M. Hamid Arfin,<sup>4</sup> there are 5 (five) values inherently in the Islamic legal system, as follows:

1. Value of God (Ilahiyyah);
2. Value of Caliphate;
3. Value of balance (*tawazun*);
4. Value of justice; and
5. Value of welfare (*maslahah*).

The essence of value of *Ilahiyyah* must be believed its existence and role in all dimensions of human life. Every human being constantly defend his behavior fortified by faith Islamiyah in the form of all human activity. It is

<sup>1</sup> M. Arfin Hamid, *The Islamic Law in Indonesian Perspectives: an Introduction to Understand its Reality in Indonesia*, UmitohaUkhuwah, Makassar, 2011, pp.119-120.

<sup>2</sup> Yusdani, *The Role of Public Interest in Reactualisation of Law: Discussion on Concept of the Islamic Law of Najamuddin at-Thufi*, UII Press, Yogyakarta, 2000, p.118.

<sup>3</sup> Ibid, p. 120.

<sup>4</sup> M. Arfin Hamid, op.cit., p.79.

always returned to the provisions of sharia as the main base. The value of Caliphate is contained within the Islamic legal system that is a number *nubuwwah* nature, as exemplified by the Prophet such as *siddiq* (honesty), trust (in charge), *fathonah* (smart), and *tabligh* (communicative / professional). It is also based on morality, brotherhood, and *insaniyah* (humanistic), so there is no exploitation of one another. The value of balance is not just a fulfillment of spiritual and material needs but the balance between private interests and public interests (public). The value of justice is a measure of the merits of a law, to seek a way out of the shackles of life in a rational way to use the law to achieve justice in human life.

The principle of value of welfare (*maslahah*) is a principle that should not be ruled out. It is because in the system of Islamic law this principle is the essence of the human being in the running of all activities and efforts which basically gives priority in the form of usefulness and usability to all elements. The role of Islamic criminal law in maintaining the welfare principle is further elaborated by providing guarantees of protection to all mankind and the universe. The existence of Islamic criminal law is characterized by public law to occupy a significant position in the study of the Islamic legal system. This is due to in charge of the Islamic criminal law contained material that is closely related to the values of humanity and the welfare of mankind as well as the rules that determine the actions that are not permitted with the threat of sanctions.

#### 4. Conclusion

The nature of the Islamic sentence is given to the people as the offenders. It is prohibited to be judged to innocent people. This is the basic rule of the Islamic legal system that is based on Qur'an and Hadith. In its implementation, the form of the Islamic sentence is *qiyas*, *diyat*, *kafaraat*, disenfranchisement inherit, and *ta'zir*. In terms of the legal position of the Islamic sentence law, it has outlined 3 (three) types of law, as followings: *I'tiqadiyah* Law, *Khuluqiyah* Law, and *Amaliyah* Law. The legal standing of the Islamic sentence must fulfill such values inherently such as value of god (ilahiyah), value of caliphate, value of balance (*tawazun*), value of justice, and value of welfare (*maslahah*).

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